



DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 214

RIN 1615–AC61

Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions, Implementation of Vacatur

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: Final rule; withdrawal.

SUMMARY: This final rule withdraws the “Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions,” final rule issued on January 8, 2021, because that rule has been vacated by a Federal district court.

DATES: The Department of Homeland and Security is withdrawing the final rule published January 8, 2021 (86 FR 1676), which was delayed by the final rule published February 8, 2021 (86 FR 8543), as of [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Charles L. Nimick, Chief, Business and Foreign Workers Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 5900 Capital Gateway Drive, Mail Stop 2090, Camp Springs, MD 20588–0009. Telephone Number (240) 721–3000 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Background and Basis for Removal of Regulations

On January 8, 2021, after going through notice and comment rulemaking, the Department of Homeland Security (DHS) issued a final rule titled “Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions”

(“H-1B Selection Final Rule”).¹ The rule was scheduled to go into effect on March 9, 2021. On February 8, 2021, DHS issued a final rule delaying the effective date of the H-1B Selection Final Rule to December 31, 2021.² On March 19, 2021, Plaintiffs in ongoing litigation moved to file an amended complaint in the U.S. District Court for the Northern District of California adding the H-1B Selection Final Rule to the list of challenged agency actions,³ which the court granted leave to file on April 15, 2021.⁴ Following several months of litigation, on September 15, 2021, the court vacated the H-1B Selection Final Rule and remanded the matter to DHS.⁵

DHS intends to comply with the court’s decision vacating the H-1B Selection Final Rule. Therefore, since regulatory changes promulgated through the H-1B Selection Final Rule are scheduled to be codified in the Code of Federal Regulations (CFR) at 8 CFR 214.2 on the rule’s new effective date, December 31, 2021, DHS is issuing this rule to withdraw the vacated H-1B Selection Final Rule.

DHS is not required to provide notice and comment or delay the effective date of this rule because this rule simply implements the court’s vacatur of the H-1B Selection Final Rule and ensures that the vacated regulatory provisions are not codified in CFR. Following the vacatur, the changes made by the H-1B Selection Final Rule do not have any legal effect.

¹ *Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions*, 86 FR 1676 (Jan. 8, 2021).

² *Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions; Delay of Effective Date*, 86 FR 8543 (Feb. 8, 2021).

³ *See Chamber of Commerce of the United States of America et al. v. United States Department of Homeland Security, et al.*, No. 4:20-cv-07331 (N.D. Cal. March 19, 2021) (Amended Complaint).

⁴ *See Chamber of Commerce of the United States of America et al. v. United States Department of Homeland Security, et al.*, No. 4:20-cv-07331 (N.D. Cal. Apr. 15, 2021) (Order Permitting Supplementation of Complaint and Extending Deadline to Submit Joint Case Management Conference Statement).

⁵ *See Chamber of Commerce of the United States of America et al. v. United States Department of Homeland Security, et al.*, No. 4:20-cv-07331 (N.D. Cal. Sep. 15, 2021) (Order Granting Pl.’s Motion for Summary Judgment and Denying Def.’s Cross-Motion for Summary Judgment; Judgment). On November 12, 2021 a notice of appeal was filed in the case. On November 30, 2021, the government filed a motion to voluntarily dismiss the appeal, and the appeal was dismissed on December 2, 2021. The district court’s judgment is final.

Moreover, good cause exists here for forgoing notice and comment and a delayed effective date even if those procedures were otherwise required. Notice and comment and a delayed effective date are unnecessary for the implementation of the court’s order vacating the rule and would be impracticable in light of the agency’s immediate need to implement the final judgment. *See* 5 U.S.C. 553(b)(B), (d). Furthermore, DHS believes that delaying this ministerial act would be contrary to public interest because it could lead to vacated regulatory provisions being codified and significant confusion among the regulated public regarding the administration of the fiscal year (FY) 2023 H-1B numerical allocations, generally known as the “H-1B cap,” which is likely to begin in early March 2022.⁶

DHS has concluded that each of those three reasons—that notice and comment and a delayed effective date are unnecessary, impracticable, and contrary to the public interest— independently provides good cause to bypass any otherwise applicable requirements of notice and comment and a delayed effective date.

II. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501-3521, DHS is required to submit to the Office of Management and Budget (OMB), for review and approval, collections of information and changes to collections of information. The following information collections are impacted by the vacatur. DHS is withdrawing the changes to these information collection instruments associated with the H-1B Selection Final Rule.

U.S. Citizenship and Immigration Services (USCIS) Form I-129

⁶ *See* 8 CFR 214.2(h)(8)(iii)(A)(3) (explaining that the annual initial registration period will start at least 14 calendar days before the earliest date on which H-1B cap-subject petitions may be filed, consistent with 8 CFR 214.2(h)(2)(i)(I). For the FY 2023 H-1B numerical allocations, the earliest date that H-1B cap-subject petitions may be filed is April 1, 2022, such that registration is likely to commence in early March 2022).

(1) Type of Information Collection: Revision of a Currently Approved Collection.

(2) Title of the Form/Collection: Petition for a Nonimmigrant Worker.

(3) Agency form number, if any, and the applicable component of the DHS sponsoring the collection: I-129; USCIS.

(4) Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Business or other for profit. USCIS uses the data collected on this form to determine eligibility for the requested nonimmigrant petition and/or requests to extend or change nonimmigrant status. An employer (or agent, where applicable) uses this form to petition USCIS for a noncitizen to temporarily enter as a nonimmigrant. An employer (or agent, where applicable) also uses this form to request an extension of stay or change of status on behalf of the noncitizen worker. The form serves the purpose of standardizing requests for nonimmigrant workers and ensuring that basic information required for assessing eligibility is provided by the petitioner while requesting that beneficiaries be classified under certain nonimmigrant employment categories. It also assists USCIS in compiling information required by Congress annually to assess effectiveness and utilization of certain nonimmigrant classifications. USCIS also uses the data to determine continued eligibility. For example, the data collected is used in compliance reviews and other inspections to ensure that all program requirements are being met.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: I-129 is 294,751 and the estimated hour burden per response is 2.34 hours; the estimated total number of respondents for the information collection E-1/E-2 Classification Supplement to Form I-129 is 4,760 and the estimated hour burden per response is 0.67 hours; the estimated total number of respondents for the information collection Trade Agreement Supplement to Form I-129 is 3,057 and the estimated hour burden per response is 0.67 hours; the estimated total

number of respondents for the information collection H Classification Supplement to Form I-129 is 96,291 and the estimated hour burden per response is 2 hours; the estimated total number of respondents for the information collection H-1B and H-1B1 Data Collection and Filing Fee Exemption Supplement is 96,291 and the estimated hour burden per response is 1 hour; the estimated total number of respondents for the information collection L Classification Supplement to Form I-129 is 37,831 and the estimated hour burden per response is 1.34 hours; the estimated total number of respondents for the information collection O and P Classifications Supplement to Form I-129 is 22,710 and the estimated hour burden per response is 1 hour; the estimated total number of respondents for the information collection Q-1 Classification Supplement to Form I-129 is 155 and the estimated hour burden per response is 0.34 hours; the estimated total number of respondents for the information collection R-1 Classification Supplement to Form I-129 is 6,635 and the estimated hour burden per response is 2.34 hours.

(6) An estimate of the total public burden (in hours) associated with the collection: The total estimated annual hour burden associated with this collection of information is 1,072,810 hours.

(7) An estimate of the total public burden (in cost) associated with the collection: The estimated total annual cost burden associated with this collection of information is \$70,681,290.

USCIS H-1B Registration Tool

(1) Type of Information Collection: Revision of a Currently Approved Collection.

(2) Title of the Form/Collection: H-1B Registration Tool.

(3) Agency form number, if any, and the applicable component of the DHS sponsoring the collection: OMB-64; USCIS.

(4) Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Business or other for profit. USCIS will use the data collected through the H-1B Registration Tool to select a sufficient number of registrations projected as needed to meet the applicable H-1B cap allocations and to notify registrants whether their registrations were selected.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: The estimated total number of business or other for-profit respondents for the information collection H-1B Registration Tool is 35,500 with an estimated 3 responses per respondents and an estimated hour burden per response of 0.5 hours. The estimated total number of attorney respondents for the information collection H-1B Registration Tool is 4,500 with an estimated 38 responses per respondents and an estimated hour burden per response of 0.5 hours.

(6) An estimate of the total public burden (in hours) associated with the collection: The total estimated annual hour burden associated with this collection of information is 138,750 hours.

(7) An estimate of the total public burden (in cost) associated with the collection: The estimated total annual cost burden associated with this collection of information is \$0.

List of Subjects in 8 CFR Part 214

Administrative practice and procedure, Aliens, Cultural exchange program, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

PART 214—NONIMMIGRANT CLASSES

Accordingly, the amendments to 8 CFR part 214, published in the *Federal Register* on January 8, 2021 (86 FR 1676), which were to take effect on December 31, 2021 (86 FR

8543, February 8, 2021), are withdrawn as of [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Alejandro N. Mayorkas,
Secretary of Homeland Security.

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